

Marilyn J. Kamm
Assistant Attorney General
Department of Law
Criminal Division Central Office
P.O. Box 110300
Juneau, AK 99811
(907) 465-3428
FAX: (907) 465-4043
Alaska Bar No. 7911105
Attorney for Defendants Hyden
& Henry

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

CHARLIE J. DAVIS, JR.,)	
)	
Plaintiff,)	
)	
vs.)	
)	
ZELMAR HYDEN, ET AL.,)	
)	
Defendants.)	
_____)	Case No. 3:02-cv-214-JKS

**MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR
ATTORNEYS FEES**

Come now defendants Zelmar Hyden and Mel Henry, by and through their attorney of record, Marilyn J. Kamm, Assistant Attorney General, and hereby move for an award of attorneys fees pursuant to Rule 54(d)(2) of the Federal Rules of Civil Procedure and D. Ak. L.R. 54.3. Defendants request an award in the amount of \$20,730.00. This motion is supported by the Affidavit of Counsel and by the memorandum, *infra*.

Motion for Attorneys Fees
Davis v. Hyden, et al., Case 3:02-cv-214-JKS
Page 1 of 4.

FACTS

Plaintiff filed this lawsuit in 2002 claiming that defendants were liable for the allegedly inadequate medical care he received at Palmer Correctional Center. On May 27, 2005, defendants advised plaintiff that he needed a medical expert to make a *prima facie* claim for inadequate medical care. See Exhibit A. On November 2, 2005, defendants re-iterated plaintiff's need to retain an expert. See docket 59, Reply to Opposition to Motion to Dismiss, p. 5. On April 24, 2006, defendants made an Offer of Judgment to plaintiff in the amount of \$1000.00. Exhibit B. Even though plaintiff knew he needed an expert and that he could not find one, he declined the offer and continued to litigate the case. Summary judgment was entered in defendants' favor.

STANDARDS FOR AWARD OF ATTORNEY'S FEES

Under 42 U.S.C. Sect. 1988, prevailing plaintiffs in civil rights cases normally should be awarded attorneys fees. The purpose of this statute is to encourage meritorious civil rights actions and to discourage groundless ones.

In *Hughes v. Rowe*, 449 U.S. 5, 14 (1980)(per curiam) the Supreme Court held that a defendant may recover his attorney's fees from the plaintiff only if the district court finds that the plaintiff's action was frivolous, unreasonable or without foundation. See also *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978); *Ellis v. Cassidy*, 625 F.2d 227, 230 (9th Cir. 1980).

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO AN AWARD OF ATTORNEYS FEES BECAUSE THIS LAWSUIT WAS FRIVOLOUS, UNREASONABLE AND WITHOUT FOUNDATION.

Defendants are the prevailing parties in this case. They have requested attorneys fees incurred in the defense of this action pursuant to 42 USC 1988. After counsel was appointed to represent him and conducted initial discovery, plaintiff was put on notice by defendants that he needed an expert to make a *prima facie* claim. See Exhibit A & docket 59, Reply to Opposition to Motion to Dismiss and docket 65, p. 5, Objections to Report and Recommendation. Plaintiff insisted on litigating the case even though he knew he needed an expert to make a *prima facie* case and that he did not, and could not, find one. Defendants seek an award of fees from the date defendants filed their Reply to Opposition to Motion to Dismiss until the conclusion of this case because it was unreasonable for plaintiff to continue this litigation without an expert.

Defendants respectfully request this court to award them their fees.

Dated this 27th day of November, 2006, at Juneau, Alaska.

DAVID W. MÁRQUEZ
ATTORNEY GENERAL

By: s/Marilyn J. Kamm, ABA 7911105
State of Alaska
Department of Law
Criminal Division Central Office
PO Box 110300
Juneau, AK 99811
Phone: (907) 465-3428
Fax: (907) 465-4043
Marilyn_Kamm@law.state.ak.us

I certify that on the 27th day of
November, 2006, a copy of the foregoing
Document was served electronically on:
Motion for Attorneys Fees
Davis v. Hyden, et al., Case 3:02-cv-214-JKS
Page 3 of 4.

Thomas Matthews
Matthews & Zahare
431 W. 7th Ave, Suite 207
Anchorage, AK 99501

By: s/Marilyn J. Kamm, ABA 7911105
State of Alaska
Department of Law
Criminal Division Central Office
PO Box 110300
Juneau, AK 99811
Phone: (907) 465-3428
Fax: (907) 465-4043
Marilyn_Kamm@law.state.ak.us